

Response to the ICO Age Appropriate Design: Code of Practice for Online Services

30 May 2019

Viacom International Media Networks (VIMN) welcomes the opportunity to respond to the ICO's consultation on its proposed Code of Practice for Online Services. VIMN has been providing television services to UK audiences since 1987. We now own or part-own and operate more than 25 TV channels in the UK attracting close to 12% of viewing among 16-34 year-olds, making us the third-biggest privately held broadcast media group in the UK market with over 1000 employees at our HQ in Camden town, London. Our channels offer the very best in music, comedy, kids and general entertainment programming through the Channel 5, MTV, Comedy Central and Nickelodeon brands.

CONTEXT

The purchase of Channel 5 in 2014 not only extended VIMN's footprint into free-to-air, public service commercial television, it represented a step-change in our ambitions in the UK: to invest in more programming, to profit from the synergies between our pay and free channels, and to develop the UK as a creative hub for generating great content than can be shown around the world.

Since its acquisition by Viacom, Channel 5 has undergone a radical transformation. Last year the channel was named *Edinburgh Channel of the Year 2018*, reflecting the benefits of a radical overhaul of its schedule and 40% increase in spend on original UK productions in peak-time since 2014. *Milkshake!*, Channel 5's pre-school brand, airs on the channel every day from 6-9am weekdays and 6-10am weekends, reaching more than half of all UK children. In 2018 it invested in 29 hours of new originated content for *Milkshake!*, equating to approximately 160 individual episodes. The channel aims to increase this figure to 50 new UK originated hours per year from 2021, which will double production to over 300 individual episodes. As a result of this additional investment *Milkshake!* will be able to deliver a wider and more diverse range of UK-originated programming, as well as invest in new series of existing shows.

Outside of linear transmission the VIMN family of brands have multi-faceted digital distribution models that include websites, games and apps alongside commercial partnerships with third-party platforms for distribution such as Sky, Virgin Media, Amazon Prime. Channel 5 has its own proprietary VOD service 'My5' that is a key destination for viewers to catch-up on their favourite shows and find new and exciting quality UK content.

Set out in the rest of this document are VIMN's collated thoughts on the proposals set out in the Code of Practice for Online Services.

SCOPE OF THE CODE

VIMN appreciates that in order to make the protection of children a primary concern for digital services the ICO proposes making the code applicable to all Information Society Services (ISS) "likely to be accessed by children"¹, including generic website and online streaming services. However, VIMN would observe that extending the restrictions to all ISS in this way is overly broad and places significant practical constraints on sites and services that are not offered to or intended for children, but which children could access. Indeed, the code places significant burdens on ISS's that are not intended for or marketed to children, and for which the risk of encroaching on children's rights from a data protection point of view are disproportionately low. Thus, the code stands in contrast to the risk-based approach to data protection embodied in the GDPR, which the code is intended to support.

Additionally, broadening the age of application to all children under 18 has potentially expansive negative practical implications as older children have different needs than younger children, as recognized by the GDPR, which sets the age of digital consent at 16 (or as low as 13 depending on the Member State).

The proposed scope will negatively impact VIMN's ability to engage children with its diverse range of high quality kids brands through My5 and the respective digital services of Nickelodeon, NickJr, and Milkshake. Inhibiting the offering of UK kids content (due to its removal from mixed audience services) could be an unintended consequence of this approach. VIMN suggest the proposed scope should be amended to focus on services "offer[ing] information society services directly to a child" as that term is used in Article 8 of the GDPR and provide factors that the ICO will consider in determining whether an ISS is offered directly to a child.

The suggestion throughout the code that every provider of an ISS "carry out some market research, or refer to current evidence on user behaviour and the user base of existing services and service types,"² is not practical. As the code acknowledges, an ISS can serve numerous functions, such as providing information about an event or a film, providing a portal to access programming content, games, entry points for promotions and contests, and many more. Some sites or games are only available for a limited time, or are run under very limited budgets. As a result, many ISS's would not be developed due to the cost and delay of conducting market research, especially where an ISS provider has a strong understanding of their intended audience.

¹ ICO 2019, 'Age Appropriate Design Code: Draft Document' of Practice for Online Services', pp.13-14

² Ibid. p.13

It should be noted that these services will already be compliant with the GDPR as it was implemented into UK law through the Data Protection Act 2018. A key question for the ICO in the final drafting of its code must be what current harm, post GDPR compliance, is it trying to address? The ICO should heed its own warning that where there is too restrictive an approach to an ISS offered to children, “Often the only choice in practice is to avoid online services altogether, which means the child loses the benefits of online play, interaction and development.” The code as currently proposed could chill innovation and development of services to children, including teens.

Given the significant implications of the proposed scope of this code it should be noted that the short timeframe to respond to the consultation and the short period for businesses to ready themselves after we see the final code will present additional significant disruption to businesses and consumers.

MEASURES FOR DISTINGUISHING AUDIENCES

Whilst conceptually simple, the code’s application to all users unless robust age verification measures are in place³ introduces additional complexity that could undermine the consumer experience and their privacy.

VIMN is concerned that the safeguards outlined in the code being applied to all users is not practical or realistic, and will inhibit the development of ISSs intended for non-adult audiences. Further, the requirement that in order to verify the age of a user, an ISS provider must collect more data to make the verification does not comport with the concept of data minimization.

So-called robust age verification measures would create a negative user experience by requiring all users to provide personal data before being able to access some services or adjusting their privacy settings, and would entail delays pending the verification process. Such user friction would discourage adults from accessing ISSs that are intended for a broad or mixed audience, or even services not intended for children, but which fall under this code because children may access them.

In this context the proposed code could undermine efforts led by Ofcom, DCMS, and parliament to ensure the long-term viability of PSB. PSBs provide UK audiences with an extensive mix of UK-originated, first-run programmes and services for free which the market would not otherwise provide. The huge range of programmes on offer through services such as My5 reflects the UK’s culture, diversity and values, and offers a place where viewers know they can go to for trusted and accurate news, current affairs, documentaries and information. Strict compliance with this code as currently proposed could push consumers away from trusted media environments such as My5 towards less regulated and non-GDPR compliant illicit services.

³ ICO 2019, ‘Age Appropriate Design Code: Draft Document’ of Practice for Online Services’, p. 23.

CREATING DIFFERENT USER EXPERIENCES

In VIMN's reading of the guidance, the code requires the user experience to be tailored to various age groups, suggesting that each ISS that gathers any age information must provide multiple experiences (standards for notices and privacy controls) for different aged children. Specifically five age bands: 0-5, pre-literate and early literacy; 6-9, core primary school years; 10-12, transition years; 13-15, early teen; and 16-17, approaching adulthood. Thus, every service likely to be accessed by children will require the collection of the child's age to provide the appropriate experience for the child's age group, including for those offered to preliterate children, who may not be able to understand or provide the data.

The requirement to create multiple experiences and provide notices and prompts in multiple forms to accommodate all ages that may access an online service is not practicable. In essence, the code as proposed would require that ISS providers create five different experiences for each ISS, each with different verbiage, different options and controls, and potentially an entirely different user interface for each identified age band. In response, providers may tailor their ISSs for a narrow band of children rather than offer the services broadly, further limiting the available options for children, and inhibiting the ability for children to grow with a service.

CONFLATING SAFEGUARDS FOR DATA PROTECTION WITH CHILDREN'S CONTENT

VIMN is concerned that Section 4 of the code relating to "Detrimental Use of Data" and Section 5 relating to "Policies and Community Standards" create an ambiguity between data processing activities and content offering functions. For example in Section 4, the code makes specific reference to the Committee of Advertising Practice (CAP) guidance, which relates to advertising restrictions, which, the ICO acknowledges, includes "rules which govern or prohibit the marketing of certain products, such as high fat, salt and sugar food and drinks and alcohol, to children, and general guidance on transparency of paid-for content and product placement"⁴.

Section 5 states that in order to comply with this section of the code, "If you make commitments to users about the content or other aspects of your online service then you need to have adequate systems in place to ensure that you meet those commitments... So if you say that the content of your online service is suitable for children within a certain age range then you need to have systems in place to ensure that it is."⁵ Whilst both these statements are objectively correct, it is unclear why they are featured in the ICO guidance given TV-like and advertising content are not regulated by the ICO.

Further, the code is ambiguous when assigning responsibility for content of third parties that may be recommended to children, stating, "Data protection law doesn't make you responsible for third party content but it does make you responsible for what you 'feed' to children who use your

⁴ ICO 2019, 'Age Appropriate Design Code: Draft Document' of Practice for Online Services', p. 34.

⁵ Ibid. p. 41.

service, based upon your use of their personal data.”⁶ If not third party content, what is the ICO concerned that children might be fed?

VIMN suggests that Section 4 and Section 5 of the code are clarified. The code must focus on data processing activities and not interpose other standards that are overseen and enforced by other regulatory and self-regulatory entities. It may lead to redundant regulation and inconsistent outcomes. Regulation of content (including advertising) is already governed by Ofcom and the ASA who enforce a number of self-regulatory codes, including the CAP Code and the BCAP code.

To the extent the code makes an ISS provider responsible for third-party content, it is unnecessary and impractical. If a ISS offers access to third-party products or services, it seems improper to require the primary ISS provider to have vetted each piece of content for appropriateness. If this is not the intention of the ICO, VIMN would welcome further clarity on this point also.

INCORPORATING CONSENT MECHANISMS

The code requires the use of privacy settings, just-in-time notifications and “online tools,” which may be impractical, and which may require parental intervention or consent, but the code does not explain how to incorporate consent mechanisms into an ISS.

Turning personalization off by default, as proposed, will set back the user experience for technology decades, making it more arduous and difficult for individuals to access the information or entertainment that they are currently accustomed to receiving nearly instantaneously. As the code seems to acknowledge, each end user will use an ISS differently, whether it is avatars chosen to represent one’s identity in a game, the type of content one views, or amount of time spent with the experience. Turning personalization off by default would inhibit the ability of the provider to give the end user their desired experience, and instead interpose additional steps to accomplish something users expect to be implicit in the experience. For consumers viewing a service provider that is GDPR compliant and is transparent about how the data is used, personalization will actually improve the user experience and should not be limited or prohibited by the code.

Turning geolocation data off by default as described in the code, insofar as geolocation data refers to all location data, could cause significant impacts where regional or location-based services are concerned, or where there are contractual or IP limitations with respect to the geographies that certain content can be offered. The code should provide greater guidance about the level of specificity of geolocation data that should be turned off. Further, the code should allow the collection of general location data to allow for the provision of certain services that may be specific to a particular region or city.

The code does not provide adequate guidance whether a child under 13 may engage with privacy settings and online tools without parental intervention, or whether such choices by the child

⁶ Ibid. p. 65.

require parental consent (GDPR Article 8). Further, to the extent parental consent is required, the code does not provide any guidance as to how that parental consent can be sought or how the user experience would incorporate parental interventions or other mechanisms to obtain parental consent as required under Article 8 of the GDPR.

PROPOSED USE OF DATA PROTECTION IMPACT ASSESSMENTS

The code requires a DPIA for each processing activity of a child, including some form of market research or user testing⁷. Conducting DPIAs for all processing of children's data seems unnecessary. Although it is not disputed that children merit special protections with respect to how their data is processed, a DPIA should only be required for higher risk processing activities. Requiring a DPIA for a processing activity that uses minimal data or has very low risk to the rights of the child (e.g., allowing a child to send a question by email or other method, where the child's contact information is only used to respond to the question and then discarded) seems excessive relative to the risk.

Further requiring the use of market research to support the processing activity in a DPIA is overly burdensome. Market research may be relevant in limited instances, such as with respect to a new or novel technology, or with respect to a new type of product offering. Commonplace data processing activities in connection with analytics or contests and promotions would not benefit from use of market research data, but would increase cost burdens on the service. As stated above, market research on every child-related initiative is unnecessary and will not further the interest of protecting children from overly intrusive data processing activities. A provider of an ISS should be able to rely on its own understanding of its audience, and its ability to balance the potential risks of each activity. Market research can be employed where it will truly benefit the provider in building the service, but it should not be a requirement baked into each analysis.

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⁷ ICO 2019, 'Age Appropriate Design Code: Draft Document' of Practice for Online Services', pp. 85-86.